Case No: SC87548

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF BABY GIRL P.

E.P.,

Appellant,

vs.

A.M. and L.M.

and

Adoptions of Babies and Children Inc.,

Respondents.

SUBSTITUTE REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Constitutional Provisions:

Restatements of Law:

JURISDICTIONAL STATEMENT

Appellant incorporates herein by reference the Jurisdictional Statement set forth in Appellant's Substitute Brief previously filed herein.

STATEMENT OF FACTS

Appellant incorporates herein by reference the Statement of Facts set forth in Appellant's Substitute Brief previously filed herein.

POINTS RELIED ON

I. The trial court erred in denying E.P.'s Amended Motion to Withdraw Consent to Adoption because E.P. has standing to challenge § 453.030.7 RSMo., in that (a) E.P. raised her due process claims prior to this appeal, and (b) E.P. was denied due process and directly harmed as a result of actions, and inactions, taken by her attorney, and the Respondents, their agents and representatives, and, in that neither the statute in question nor the consent form signed by E.P. at the request of the Respondents sets forth a specific procedure whereby E.P. could withdraw her consent.

II. The decision of the Missouri Court of Appeals for the Western District in *In the Interest of Baby Girl P.* correctly held that the trial court erred in requiring that a withdrawal of consent to adoption be in writing, because adoption involves the destruction of the parent-child relationship and adoption statutes are be strictly construed in favor of the natural parents, in that § 453.030.7 RSMo. provides, without qualification, that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge and the statute sets forth no requirement that said withdrawal of consent be in writing.

III. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides, without qualification, that a biological parent may withdraw her consent to adoption at any time prior to the acceptance and approval of the consent by a judge, in that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent to the adoption of her child constituted a withdrawal of her consent and said actions were taken prior to the approval and acceptance of the biological mother's consent by a judge.

IV. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge, in that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent to the adoption of her child constituted a withdrawal of her consent, said actions being taken prior to the approval and acceptance of the biological mother's consent by a judge.

V. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a parent is to be relieved from her previously given consent where said consent was given while she was under duress from a "force of circumstances", in that, the biological mother had little, if any, knowledge of the legal system under which the adoption would be granted, the mother had little, if any, ability to communicate in the English language, the attorney hired by the Respondents to represent the mother did not speak her native language, and the mother was given false information by the Respondents regarding the status of her consent, such that the mother's consent was given while she was under duress of a "force of circumstances".

VI. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a biological parent will be allowed to withdraw her consent if said consent was obtained through fraud or misrepresentation, or for "good cause", in that, in executing said consent, the biological mother reasonably relied upon numerous misrepresentations made to her by the Respondents, their agents and representatives, which effectively precluded the biological mother from providing a knowing and voluntary consent to the adoption of her child, and any inaction by the biological mother to withdraw her consent after the execution thereof was also induced by numerous misrepresentations made to her by the Respondents.

VII. The trial court erred in denying E.P.'s Amended Motion to Withdraw Consent to Adoption because the issue of "best interests" of the child are not properly before this Court, in that, even were there evidence before the court that denying E.P.'s Amended Motion to Withdraw Consent to Adoption was in the "best interests" of the child, the question of whether a biological parent has consented to the adoption of her child is a jurisdictional issue and issues involving "best interests" of the child may not be reached unless, and until, the court has jurisdiction.

ARGUMENT

I. The trial court erred in denying E.P.'s Amended Motion to Withdraw Consent to Adoption because E.P. has standing to challenge § 453.030.7 RSMo., in that (a) E.P. raised her due process claims prior to this appeal, and (b) E.P. was denied due process and directly harmed as a result of actions, and inactions, taken by her attorney, and the Respondents, their agents and representatives, and, in that neither the statute in question nor the consent form signed by E.P. at the request of the Respondents sets forth a specific procedure whereby E.P. could withdraw her consent.

Preservation of E.P.'s constitutional claims

While it is true that, generally, constitutional issues must be raised at the earliest opportunity if they are to be preserved for review, *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996), Respondents would lead this Court to believe that E.P. never raised due process arguments before bringing this appeal. In fact, E.P. has raised due process arguments as far back as August 21, 2004. In "Mother's Amended Motion for Rehearing", E.P. explicitly claims a denial of due process:

> "31. Further, all of the aforementioned circumstances demonstrate the fact that the mother was denied fundamental due process in this

process and proceeding before the court. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive life, liberty or property without due process of law." *U.S. Constitution, Amendment XIV, Section 1.* The United States has long established that the Due Process Clause provides "heightened protection" against government interference with certain fundamental liberty interest of parents in "the care, custody, and control of their children." *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

ABC Adoptions, in their role as an "agent" for the mother failed to protect her fundamental liberty interest during and after the consent process. By not acting on information provided directly to them and to their other hired "agents", the court was deprived of vital information concerning the child. This, in effect, denied the mother due process." (LF 71).

In this case, as in *Call v. Heard*, the Respondents "had the opportunity to respond and the trial court had the opportunity to address the issues; thus the purposes of the rule were met." *Call v. Heard*, 925 S.W.2d at 847.

Arguments related to due process have been a part of the record through two rounds of appeals and have been raised in Appellant's Briefs to the Western

District Court of Appeals. Respondents attempt to parse intertwined arguments regarding due process and vagueness by stating in a footnote that, "E.P. did raise the issue that neither the statute nor the consent form give instructions as to how a consent must be withdrawn but she did not claim that this denied her due process." It is clear, however, that, underlying E.P.'s arguments regarding vagueness, is the constitutional requirement that a parent is entitled to substantive due process. Regardless of how Respondents wish to label E.P.'s prior due process claims, the fact remains that, from the inception of this case, E.P. has continually, and without fail, asserted that her rights as a mother, protected by the United States and Missouri Constitutions, have unfairly been denied by the Respondents, their agents and employees, and the courts.

Plain error doctrine

Even were this Court to find that E.P. did not raise the denial of due process claim earlier in this litigation, this Court can consider the denial of due process arguments under the plain error doctrine. Supreme Court Rule 84.13(c). This rule provides that,

> "Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." *Id.*

This case centers on the manifest injustice that has been carried out against E.P. Her rights as the biological mother were trampled by a system and individuals that failed to provide clear guidance as to how she could assert her fundamental rights as a biological mother. Her lack of knowledge of the judicial system, the language barriers she faced, and the misrepresentations made to her by the adoption agency, and attorney provided to her by the adoption agency, worked in concert to deprive E.P. of her constitutionally mandated due process rights.

In *Hanch v. KFC Nat. Management Corp.*, 615 S.W.2d 28 (Mo. 1981), this Court considered a constitutional First Amendment challenge that had not previously been raised. This Court reasoned that,

> "[i]nasmuch as appellant is claiming an infringement upon the jealously protected right of free speech, it would appear that a full adjudication on the merits would be in order lest that infringement, if it exists, go unremedied." *Id.* at 33.

This Court is again confronted with a "jealously protected right." The U.S. Supreme Court has consistently held that the right to parent one's child is one of the oldest and most fundamental rights recognized by our system of laws. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As such, this Court is not barred from adjudicating E.P.'s due process claims.

E.P.'s standing to challenge § 453.030.7 RSMo.

Respondents attempt to argue that E.P. lacks standing because she has not been harmed. This argument clearly fails because E.P. has been denied the right to her child. Had the appropriate due process safeguards been in place, Baby Girl P. would have been in the care of her mother beginning in June, 2004, shortly after she was born.

Respondents focus their due process arguments on the incidents that occurred prior to, and during, the consent hearing of June 18, 2004. However, E.P. has repeatedly argued that the due process failures occurred, not only prior to the consent hearing of June 18, 2004, but after the consent hearing and prior to the time her consent was approved and accepted by an Article V judge, when E.P. made known her desire to withdraw her consent to adoption.

As E.P. discussed in her Substitute Brief previously filed with this court, the record reflects that, beginning June 19, 2004, the day after the consent hearing and three days before the consent was approved and accepted by a judge, E.P. repeatedly communicated to the adoption agency and other parties involved that she had changed her mind and wanted her child returned to her.

The facts of this case clearly illustrate that E.P. was denied her due process rights. ABC Adoptions failed to have resources in place to allow E.P. to more clearly express her desire to withdraw her consent to adoption. Instead

of acting quickly, ABC Adoptions used the language barriers to insulate themselves from the knowledge that E.P. had changed her mind and could legally withdraw her consent to adoption.

Respondents' arguments that E.P. had an interpreter ring hollow when, at the time she needed an interpreter most – when she was notifying ABC Adoptions of her withdrawal of consent, an interpreter was not provided to her. Indeed, the focus of the due process inquiry should not, as Respondents attempt to do, focus on E.P.'s actions or inactions, but should focus on the actions, and inactions, of ABC Adoptions and Mr. Kenney that resulted in the ultimate denial of E.P.'s fundamental liberty interests.

II. The decision of the Missouri Court of Appeals for the Western District in *In the Interest of Baby Girl P.* correctly held that the trial court erred in requiring that a withdrawal of consent to adoption be in writing, because adoption involves the destruction of the parent-child relationship and adoption statutes are be strictly construed in favor of the natural parents, in that § 453.030.7 RSMo. provides, without qualification, that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge and the statute sets forth no requirement that said withdrawal of consent be in writing.

Respondents argue in their Substitute Brief that the Missouri Adoption Code requires that a withdrawal of consent to the adoption of a child be in writing. In support thereof the Respondents cite various sections of Chapter 453 RSMo. that require that various documents be in writing. Respondents fail to acknowledge, however, that the only provision of the statute at issue in the case currently before the Court is § 453.030.7 RSMo., and that precision in other portions of that Chapter only serves to demonstrate that, had the legislature intended the withdrawal of a biological parent of their previously given consent to adoption be in writing, it would have specifically set forth such a requirement in the statute. Further, as the Court of Appeals has previously

noted, the sanctity of the parent-child relationship requires "that any judicial termination of such a relationship is an exercise of awesome power that must be tempered and controlled by strict and literal compliance with the statutes." *In the Interest of K.L.S.*, 119 S.W.3d 548, 551 (Mo. App. 2003).

It is undisputed that E. P. did not file a formal, written withdrawal of her consent to adoption of her child prior to the acceptance of her consent by the circuit judge. However, it can also not be disputed that § 453.030.7 does not require that a withdrawal of consent be in writing or formally presented to the court in order to be effective. And, although the Respondents attempt to distinguish the present case from *In re Adoption/Guardianship No. 11137*, 664 A.2d 443 (Md. Ct. App. 1995), the salient facts are very similar and persuasive.

Further, and perhaps most importantly, the Missouri Court of Appeals for the Western District has held that the withdrawal of a birth parent's consent to adoption of a child is not required to be in writing and adoption statutes are to be strictly construed against the deprivation of natural parents in regard to the parent and child relationship, *In the Interest of Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005); a holding the Respondents conveniently choose to ignore.

The Respondents claim that, since § 453.030.3 RSMo. requires that a birth parent's consent be in writing, it follows that the withdrawal of consent

must also be in writing. Respondents state that to hold otherwise would cause disharmony within Chapter 453. This position is illogical.

The actions of consenting to the adoption of a child and withdrawing said consent are two very different and opposing actions. § 453.030 RSMo. does require that a birth parent's consent to adoption be in writing and, in fact, lists numerous other requirements, including specific language that must be used for the consent to be effective. The specificity of this section suggests that, if in fact the legislature had intended for the same requirements that are applied to a consent be applied to a withdrawal of consent, those requirements would have been written into the statute. Indeed, the absence of a written requirement more likely demonstrates an intention on the part of the legislature to respect and preserve the rights of natural parents and make it easier for parents to withdraw a previously given consent. To assume that the legislature intended otherwise, and, consequently, to require a parent to comply with conditions not specifically set forth in the statute, violates the spirit and, more importantly, the plain meaning of the law. As the Court of Appeals in *In the Interest of Baby Girl P.* noted, "[t]he statute does not…by its terms require that a withdrawal of consent be executed, or in writing… Because adoption involves the destruction of the parent-child relationship, we strictly construe the adoption statutes in favor of

the rights of the natural parents." *Id.* at 865. See also, *In re Adoption of McKinzie*, 275 S.W.2d 365 (Mo. App. 1955).

In that § 453.030.7 RSMo. does not set forth a specific procedure by which a natural parent must abide in withdrawing a consent to adoption of a child previously made, and, in that the nature of the parent-child relationship is of such importance that courts should act to preserve its integrity in the best interest of the child, "any words that indicate that a natural parent does not intend to relinquish his or her rights to the child, if found by a trial court to have been timely communicated", should be broadly construed as tantamount to the withdrawal provided for in § 453.030.7 RSMo. See, *In Re: Adoption/Guardianship No. 11137,* 664 A.2d at 449. See also, *In the Interest of A.N.M., et al.*, 517 S.E.2d 548 (Ga. App. 1999).

III. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides, without qualification, that a biological parent may withdraw her consent to adoption at any time prior to the acceptance and approval of the consent by a judge, in that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent to the adoption of her child constituted a withdrawal of her consent and said actions were taken prior to the approval and acceptance of the biological mother's consent by a judge.

The Respondents argue in their Substitute Brief that, in order for it to be effective, a biological parent's withdrawal of consent to the adoption of a child needs to be presented to the trial court. And, while the Respondents correctly note that the issue of "to whom" the withdrawal of consent must be communicated is a matter of general importance in this State, they reach a conclusion that is, at best, illogical and contrary to the well-established public policies previously set forth by the courts of this State.

Respondents argue that since the mother appeared in court and orally requested that the court accept her consent, she is required to take back or remove it from the trial court. However, this position ignores the obvious

nature of the value of the consent and brings to the forefront the ultimate question regarding to whom a withdrawal of consent is to be presented: that is, for whose benefit is the consent given? It is, of course, to benefit the adoptive parents. And, notwithstanding the Respondents' statement to the contrary, the biological mother did give her consent to ABC Adoptions. Clearly, this case would not be before this Court were it not for the involvement and services of ABC Adoptions, who were acting as "agents" of the adoptive parents.

Although the Respondents cite a number of cases from Oregon in support of their position that extrajudicial notification is not sufficient for effective withdrawal, this conclusion is unfounded. All of the cases cited by the Respondents involved some type of written notice to the court, and were found to be sufficient notice of the withdrawal. However, the cases cited by Respondents do not address the issue of whether notice was **required** to be given to the court.

In *McCulley v. Bone,* 979 P.2d 779 (Or. App. 1999)*,* the court affirmed the trial court's ruling to set aside the adoption decree based on the fact that the court had received a report from the adoption agency which expressed the mother's change of heart, prior to the decree being entered. The appellate court found that the trial court had received a "clear warning" that the mother may have withdrawn her consent to the adoption, and thus, the trial court should

have afforded the mother an opportunity to express her position prior to the court entering its decree. *Id.* at 794.

Likewise, the court in *In the Matter of Lauless,* 338 P.2d 660 (1959), faced a similar factual situation where a birth parent challenged an adoption decree claiming that the report of an adoption agency, which stated that the birth parent wished to withdraw her consent to the adoption of her child, was sufficient to notify the court that the birth parent had changed her mind about the adoption. *Id.*

Even were the above line of cases to stand for the proposition that a birth parent's withdrawal of consent must be given to the trial court, the facts of the present case are clearly distinguishable from those in both *McCulley*, and *Lauless*.

First, both cases involved challenges to an adoption decree that had already been entered by the court. In the present case, there is no doubt that the trial court had warning of E.P.'s intent to withdraw her consent and the adoption in this case has not been finalized. Second, both of the cases cited by the Respondents involved parents who could speak and understand the English language and, thus, had the ability to freely communicate with the adoption agency, attorneys, and court.

Finally, in its decision in *McCulley,* the court makes clear that the consent in question provided "on its face" that the birth parent had a right to withdraw said consent and, in fact, specified the time period within which it could be exercised. The consent form utilized in the case currently before the Court provided no such notice of a right to withdraw, and was written in English, a language that E.P. could not read nor understand.

Respondents also challenge E.P.'s claim that ABC Adoptions was acting as an agent of the adoptive parents. The record is replete with uncontradicted testimony from ABC Adoptions and others regarding the agency relationship between ABC Adoptions and the prospective adoptive parents.

The agency introduced E.P. to Art and Lisa as a potential adoptive family, and E.P.'s only method of contacting Art and Lisa was through the agency. Further, as previously stated, there is no requirement that E.P. establish that the adoptive parents knew of her withdrawal, since notification given to an agent is notice to the principal, if it is given to an agency either authorized or apparently authorized to receive it. Restatement of Agency, § 268. Thus, it is clear that ABC Adoptions, and, ergo, the adoptive parents, had notice that E.P. wanted to withdraw her consent before it was approved and accepted by a Judge.

IV. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge, in that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent to the adoption of her child constituted a withdrawal of her consent, said actions being taken prior to the approval and acceptance of the biological mother's consent by a judge.

In arguing that E.P. did not orally communicate a withdrawal of her consent to the adoption the Respondents rely upon a very narrow interpretation of both § 453.030.7 RSMo. and the Western District Court of Appeals' opinion in *In the Interest of Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005). In addition, Respondents conveniently misstate the evidence in an effort to distinguish this case from well-established precedent.

The Respondents claim that the trial court heard evidence to support E.P.'s claim that she orally withdrew her consent and heard evidence to the contrary. Reaffirming the truism that it is impossible to prove a negative, the Respondents cite no evidence in the legal record that would support this claim.

In fact, while the Respondents claim that the only witness who testified that the biological mother orally communicated her desire to withdraw her consent, prior to its acceptance by the family court judge, was E.P., the record is clear that the only witness to testify that E.P. did **not** clearly communicate that she wanted her child returned to her was Ms. Welch, the birth parent coordinator for ABC Adoptions. And while Respondents' brief states that "Catherine Welch testified that E.P. did call her on June 19 but E.P. did not state that she had changed her mind about the adoption", this not only misstates the testimony of Ms. Welch, but is a clear attempt by the Respondents to deceive this Court.

Ms. Welch specifically testified that she did not understand what E.P. was saying during their phone conversations of June 19, 2004. (TR 129, 133) Nevertheless, Ms. Welch did admit that she could tell E.P. was upset, that she mentioned something about the baby, and that she recognized the possibility that E.P. had changed her mind about the adoption. Thus, it is clear that there was no evidence whatsoever that contradicted the testimony of Iberty Gideon, Judith Abisaab, and Enedina Wilbers, all witnesses who testified that E.P. communicated to them that she wanted her child returned to her. Certainly, one can not, while keeping a straight face, argue that E.P.'s communications to the various parties involved in this action were not sufficient to at least put the

parties on notice that E.P. had changed her mind about the adoption. See, *In Re Adoption/Guardianship No. 11137*, 664 A.2d 442, 448-49 (Md. App. 1995).

Inasmuch as the Respondents' attempt to distinguish the holding in *Epperson v. Director of Revenue*, 841 S.W.2d 252 (Mo. App. 1992), relies upon the false assumption that there was contradictory evidence in the case currently before the Court, the rule set forth in *Epperson* clearly applies here; when reviewing the judgment of a trial court, the appellate court will defer to the findings of the trial court where the credibility of a witness is involved, a reviewing court need not do so where the disputed question is not a matter of direct contradictions by different witnesses. *Id.* at 255.

In addition, while the Respondents apparently assert that, since E.P. did not specifically state, "I withdraw my consent to the adoption", E.P. should not be allowed to withdraw her consent as allowed by § 453.030.7 RSMo., such an assertion borders on the absurd. Clearly, § 453.030.7 RSMo. does not require that a biological parent use any specific words to communicate her desire to withdraw her previously given consent. Not only is such precise phrasing not required by the statute, but, such an interpretation of the statute would preclude most, if not all, non-English speaking parents from being able to exercise their right to withdraw their consent under the statute. Surely, this is not a result the legislature sought to effectuate when the statute was implemented.

The Respondents also assert that the trial court's finding that E.P.'s statement, "I want my baby back", is vague and ambiguous and could reasonably be interpreted as an expression of sadness and grief regarding E.P.'s decision to make an adoption plan for her child. Had E.P. stated, "I wish I had my baby", perhaps such a conclusion could be drawn. However, the use of the verb "want" demonstrates an intent on the part of E.P. to have her child returned to her.

The Respondents also attempt to distinguish *In Re Adoption/Guardianship No. 11137*, 664 A.2d 442 (Md. App. 1995), from the case at bar on the basis that the court's holding in the former case was "based on the complete lack of notice to the biological mother that an adoption action had been filed and was proceeding through the court." (Respondents' Substitute Brief, p. 63-64). However, the Maryland court makes clear in its opinion that the trial court erred in concluding that appellant's communication, that she was going to try to get [the adoption] overturned, if in fact made, was not sufficient to put [adoptive father] on notice. 664 A.2d at 449. The court went on to say that, "[w]ere we to decide this case solely on the ground that appellant's revocation, if communicated, was timely, we would remand to the trial court for further proceedings to determine the occurrence *vel non* of the

conversation in which appellant revoked her consent." *Id.* Thus, Respondents' reading of the Maryland case is erroneous.

V. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a parent is to be relieved from her previously given consent where said consent was given while she was under duress from a "force of circumstances", in that, the biological mother had little, if any, knowledge of the legal system under which the adoption would be granted, the mother had little, if any, ability to communicate in the English language, the attorney hired by the Respondents to represent the mother did not speak her native language, and the mother was given false information by the Respondents regarding the status of her consent, such that the mother's consent was given while she was under duress of a "force of circumstances".

In Point V of their Substitute Brief the Respondents claim that E.P.'s consent to the adoption of her child was given free of duress because E.P. was provided with various procedural protections throughout the adoption process. Even were the alleged procedural protections provided to E.P. as the Respondents claim, such does not ensure the absence of duress. As previously set forth in Appellant's Substitute Brief, the record is replete with examples of

actions, and non-actions, taken by the Respondents, their agents and employees, which helped cultivate a field of duress of "force of circumstances".

The Respondents also argue that E.P. simply changed her mind about the adoption and that the "case law in Missouri is clear that a 'change of mind' is not a sufficient basis upon which a consent can be withdrawn." (Respondents' Substitute Brief, p. 74). In support thereof the Respondents cite *In re Adoption of R.V.H.*, 824 S.W.2d 28 (Mo. App. 1991), and *In the Interest of A.M.K., et al.*, 723 S.W.2d 50 (Mo. App. 1987). A review of recent statutory history of adoption statutes in Missouri reveals, however, that Respondents' reliance on said authority is misplaced.

Prior to 1985, § 453.050 RSMo. provided, *inter alia*, that a waiver or consent to adoption by a natural parent was "irrevocable without leave of the court having jurisdiction of the child given at a hearing, notice of which has been given to all interested parties." In 1985, that section was amended and the provision that the waiver or consent of a natural parent to adoption was "irrevocable without leave of the court" was removed.

Subsequent thereto, a few cases reached the appellate level and the courts continued to hold to the basic premise that, absent leave of court, a natural parent could not revoke their prior written consent to adoption. *In Re Adoption A.D.A*, 789 S.W.2d 842 (Mo. App. 1990); *In Interest of D.C.C.*, 935 S.W.2d

657 (Mo. App. 1996). This changed with the introduction of House Bill 343, enacted into law in 1997.

Under the current statute, "the written consent required [of a natural parent to the adoption of their child] **may be withdrawn anytime until it has been reviewed and accepted by a judge**." § 453.030.7 RSMo. (emphasis added); see, *In the Interest of K.L.S.*, 119 S.W.3d 548 (Mo. App. 2003). This rule of law was affirmed in *In the Interest of Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005), wherein the Western District Court of Appeals specifically held that "[t]here is no longer any question about the birth parent's motivation in seeking the withdrawal; this is simply irrelevant under the statute." *Id.* Thus, the Respondents' contention that "a 'change of mind' is not a sufficient basis upon which a consent can be withdrawn" is clearly an erroneous recitation of the current status of the law in the State of Missouri.

VI. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a biological parent will be allowed to withdraw her consent if said consent was obtained through fraud or misrepresentation, or for "good cause", in that, in executing said consent, the biological mother reasonably relied upon numerous misrepresentations made to her by the Respondents, their agents and representatives, which effectively precluded the biological mother from providing a knowing and voluntary consent to the adoption of her child, and any inaction by the biological mother to withdraw her consent after the execution thereof was also induced by numerous misrepresentations made to her by the Respondents.

Respondents claim in Point VI of their Substitute Brief that E.P.'s consent was not obtained through misrepresentation and that E.P. was not subjected to any misrepresentation that prevented her from timely withdrawing her consent. They further argue that there was not good cause sufficient to allow E.P. to withdraw her consent. In support thereof, Respondents claim that conflicting evidence was presented to the trial court regarding misrepresentations made by Respondents to E.P. prior to, and subsequent to, E.P. giving her consent to the adoption of her child, and that, as a result, the

judgment of the trial court should be upheld. Once again, Respondents misstate the evidence.

There was, in fact, no contradictory testimony regarding the misrepresentations made to E.P., both prior to and subsequent to her giving her consent to the adoption of her child. Indeed, the Respondents fail to cite any reference in the legal record that would support such an assertion. This is an understandable omission since such a reference does not exist. On the other hand, the record is sated with references to misrepresentations made by Respondents, their agents and employees, prior to and subsequent to the consent hearing held on June 18, 2004.

On a number of occasions, prior to E.P. withdrawing her consent, E.P. was given false information by the prospective adoptive parents, through ABC Adoptions and the attorney hired by ABC Adoptions to "represent" E.P. at the initial consent hearing. Prior to the consent hearing, none of the parties, including the attorney hired by ABC Adoptions to represent E.P., explained to E.P. that she could still parent her child or that she could change her mind about the adoption at any time prior to a judge entering a final order. (TR 206–207).

From June 19, 2004, the day following the consent hearing, through June 22, 2004, the day E.P.'s consent was accepted and approved by the judge, E.P. contacted at least three representatives of ABC Adoptions and communicated to

them that she wanted her child returned to her, only to be told that it was too late for her to get her child back. Thus, it is clear that the evidence adduced at trial established that misrepresentations were made to E.P. both before and after the consent hearing of June 18, 2004, that E.P. relied upon said misrepresentations, and that said evidence is uncontradicted.

VII. The trial court erred in denying E.P.'s Amended Motion to Withdraw Consent to Adoption because the issue of "best interests" of the child are not properly before this Court, in that, even were there evidence before the court that denying E.P.'s Amended Motion to Withdraw Consent to Adoption was in the "best interests" of the child, the question of whether a biological parent has consented to the adoption of her child is a jurisdictional issue and issues involving "best interests" of the child may not be reached unless, and until, the court has jurisdiction.

Finally, the Respondents argue that E.P. should not be allowed to withdraw or revoke her consent to the adoption of her child because it would not be in the best interest of the child to do so. However, while E.P. strongly disputes that a denial of her withdrawal would be in the best interest of her child, under current Missouri law, as it applies to this case, the question of best interests of the child can not be reached at this point in the proceedings.

The Respondents cite *In the Interest of D.C.C.*, 971 S.W.2d 843 (Mo. App. 1998), and *In re Baby Girl*, 850 S.W.2d 64 (Mo. banc 1993), as authority for the assertion that E.P. should not be allowed to withdraw her consent because to do so would not be in the best interest of the child. However, both

of the cases cited by Respondents were cases decided under Missouri law as it stood prior to the 1997 amendments to § 453.030 RSMo.

As the Western District Court of Appeals noted in *In the Interest of Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005), prior to the 1997 amendments to § 453.030 RSMo., the right or privilege of a biological parent to withdraw her previously given consent to the adoption of a child was completely left to the discretion of the trial court. However, the current statute "provides, briefly and without qualification, that the written consent required in cases involving the adoption of children under the age of 18 'may be withdrawn anytime until it has been reviewed and accepted by a judge.'" (LF 2(a)). Thus, under § 453.030.7 RSMo., a biological parent has an absolute right to withdraw her consent to the adoption of her child, for whatever reason, if said withdrawal is made prior to the review and acceptance of the consent by a judge, and this right can not be ignored at the discretion of the trial court. Best interest of the child, for all practical purposes, is irrelevant under the current statute.

In addition, it is well established that consent by a biological parent to the adoption of her child, or facts which make consent unnecessary, are jurisdictional in nature and issues involving the fitness of the parent and the welfare of the child may not be reached unless there is jurisdiction. *In re Adoption of K.A.S.*, 933 S.W.2d 942 (Mo. App. 1996). If this Court finds that

E.P. did withdraw her consent prior to the review and acceptance of her consent by a judge, or if this Court finds that there is other good cause to allow E.P. to revoke her previously given consent, then the question of whether it is in the best interest of E.P.'s child to remain with the Respondents can not be reached. *In re Marriage of A.S.A.*, 931 S.W.2d 218 (Mo. App. 1996).

Furthermore, while the Respondents argue that to allow E.P. to withdraw or revoke her consent to the adoption of her child would not be in the best interest of the child, it should be noted that the trial court did not address "best interests" in its order of June 6, 2005. Indeed, no evidence concerning "best interests" was even presented during the trial, and therefore, this issue is not currently before this Court for review.

Finally, in their attempt to establish that it would be in the best interest of Baby Girl P. to deny E.P. the right to parent her child, the Respondents focus on the length of time the child has been with the prospective adoptive parents, and potential harm that could occur if the child was returned to E.P. *McCulley v. Bone*, 979 P.2d 779 (Or. App. 1999), cited by Respondents, addressed this very issue in detail. The adoptive parents in *McCulley* argued that the child in question had bonded to their son and that restoring custody to the mother would emotionally harm the child. Nonetheless, the court ruled that the adoption decree should be set aside and the child returned to his biological mother

despite the fact that the child had been with the adoptive parents for a period in excess of two years. The court stated,

> "[i]n reaching this conclusion, we are mindful that this will work a significant disruption to the bonds that have formed between child and adoptive parents and their son. But no one can doubt, on the facts of this case, that the disruption and emotional consequences of child's return to her biological mother would not have been occasioned had mother's significant parental interests been respected in the way the statutes - - and perhaps constitutional principles, as well - - require." *Id.* at 795.

Further, in citing *Small v. Andrews*, 530 P.2d 540 (Or. App. 1975), the court points out that the hardships produced by a separation of the child and the adoptive parents are largely due to the resistance of the adoptive parents to the mother's efforts to regain custody, and that the adoptive parents cannot create their best argument for keeping a child by thwarting a natural parent's wishes, especially when the adoptive parents have early and frequent indications that the mother had withdrawn her consent. *Id.* at 795-796.

In the present case, the adoptive parents had notice, through their agent, ABC Adoptions, a mere day, or at the most three days, after the child was placed into their temporary custody, that the biological mother did not want her child to be adopted. Further, the prospective adoptive father testified that he

had actual knowledge that the biological mother had second thoughts about the consent and "wanted to get her baby back" on June 29, 2004. (TR 402, l. 23-25; 409, l.21 – 410, l.5). Thus, the child had only been with the adoptive parents for a total of eleven (11) days at that point. Certainly, returning the child to the natural mother would have been the selfless thing to do. Had this been done, ABC Adoptions could then have focused their attention on helping the adoptive parents find a child who actually needed a home.

Throughout this case, the biological mother has persevered in her efforts to have her child returned to her, never wavering in her efforts despite financial, educational, and language barriers, and notwithstanding numerous misrepresentations made to her by various parties in this case. In that, the primary purpose of an adoption is to provide a home for a child, not a child for a home, *McCulley*, 979 P.2d at 796, the prospective adoptive parents should not be allowed to benefit from their denial of E.P.'s fundamental liberty interest in raising her child.

CONCLUSION

Wherefore, for the reasons set forth herein, and for the reasons cited in Appellant's Substitute Brief, Appellant prays this Court enter its order reversing the decision of the trial court and for such other orders as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that (1) copy and (1) computer diskette of the foregoing was served by me, via first-class mail, postage prepaid, this 25th day of April, 2006, on each of the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and contains 7,518 words; and that the diskettes provided this Court and counsel have been scanned for viruses and are virus-free.

_____
Kimberly A. Carrington

APPENDIX

TABLE OF CONTENTS

SUPREME COURT RULE 84.13(c)

Plain Error may be Considered.

Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

§ 453.050 RSMo.

Waiving of necessity of consent, when permitted--how executed.

1. The juvenile court may, upon application, permit a parent to waive the necessity of his consent to a future adoption of the child. However, that approval cannot be granted until the child is at least two days old.

2. The waiver of consent may be executed before or after the institution of the adoption proceedings, and shall be acknowledged before a notary public, or in lieu of such acknowledgment, the signature of the person giving such written consent shall be witnessed by the signatures of at least two adult persons whose addresses shall be plainly written thereon.

3. A waiver of consent shall be valid and effective even though the parent waiving consent was under eighteen years of age at the time of the execution thereof.